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JACOB AND TORALF CONSULTING SDN BHD & ORS v. SIEMENS INDUSTRY SOFTWARE GMBH & CO KG (GERMANY); TORALF MUELLER (INTERVENER)

COURT OF APPEAL, PUTRAJAYA
VERNON ONG LAM KIAT JCA
B HASNAH MOHAMMED HASHIM JCA
HARMINDAR SINGH DHALIWAL JCA
[CIVIL APPEAL NO: W-02(NCC)(A)-1219-07-2017]
7 JUNE 2018

C ***ARBITRATION:*** *Award – Foreign award – Final award by Singapore High Court – Application to register final award – Whether only dispositive portion of award could be registered as judgment of High Court of Malaya – Whether only dispositive portion recognised as binding and enforceable – Term of 'award' in s. 2 of Arbitration Act 2005 ('AA') – Requirements under s. 38 of AA – Whether list of*
D *grounds in s. 39 of AA for refusal of registration meant to be exhaustive – Whether referred to only 'dispositive part' and not whole award – Whether parties contemplated that findings of arbitration would be disclosed for use at trial of civil suit – Whether confidentiality could be a ground to oppose registration of award – Whether analogy with procedures applicable with Reciprocal Enforcement of*
E *Judgments Act 1958 flawed*

WORDS & PHRASES: *'award' – Arbitration Act 2005, s. 2 – Application to register final award by Singapore High Court – Whether only dispositive portion of award could be registered as judgment of High Court of Malaya – Whether only dispositive portion recognised as binding and enforceable – Whether 'award' in*
F *s. 2 referred to only 'dispositive part' and not whole award*

Pursuant to a settlement agreement, the appellants and the respondent agreed to amicably resolve certain legal proceedings and to allow for a full and final settlement of all matters in issue between them. Any disputes in relation to the same were to be submitted for resolution through arbitration. Sometime
G in 2009, the appellants commenced an action against the respondent and five others ('Suit 2009'). In the suit, the appellants claimed that the settlement agreement was entered into by reason of fraudulent misrepresentation by the respondent and/or its representatives. Before the suit could be proceeded with, the respondent obtained an order from this court to stay the
H proceedings in Suit 2009 in favour of arbitration, on account of the arbitration agreement. Thereafter, the respondent initiated arbitration proceedings against the appellants in Singapore pursuant to the arbitration agreement clause. The appellants had filed a counterclaim for damages in fraud against the respondent in the arbitration proceedings. However, the
I Arbitration Tribunal made a finding that the counterclaim was withdrawn due to the appellants' failure to provide the required advances on costs. The appellants then applied to have their costs taxed and the Registrar of the Singapore International Arbitration Centre issued the taxation certificate.

The respondent, in turn, applied to the High Court of Singapore to set aside the final award. However, the application was dismissed by the High Court of Singapore. The appellants filed the instant originating summons ('OS') under s. 38 of the Arbitration Act 2005 ('AA') and O. 69 r. 8 of the Rules of Court 2012 to register the final award based on the findings made by the Arbitration Tribunal. The respondent challenged the OS on the basis that only the dispositive portion of the award was capable of being registered as a judgment of the High Court of Malaya. The Judicial Commissioner ('JC') in granting the application, held that only the dispositive portion of the award was capable of being recognised as binding and enforceable as a judgment of the High Court. The JC construed the term 'award' in s. 2 of the AA 2005 as referring to only the 'dispositive part' of an award and not the whole award. Hence, this appeal.

Held (allowing appeal; setting aside order of High Court)
Per Harmindar Singh Dhaliwal JCA delivering the judgment of the court:

(1) Based on s. 38 of the AA, the only requirement for registration was for an applicant to produce a duly authenticated original award or duly certified copy as well as the original arbitration agreement or a duly certified copy, with a translation where it is otherwise than in the national language or the English language. It was not disputed that the appellant here had complied with the formal requirements set out in s. 38. Further, the extensive nature of the list of grounds under s. 39 of the AA, for refusal of registration application in s. 38, meant that it was intended to be exhaustive, in that, the refusal of recognition or enforcement of an arbitral award could only be allowed on the grounds stated in s. 39. In this appeal, none of the grounds in s. 39 of the AA, whether as a whole or in part, was raised by the respondent at the High Court. It must follow that the JC could not refuse to register the award as a judgment of the court. (paras 20 & 22-24)

(2) Section 36(1) of the AA provides a broad basis to use an award that is registered under s. 38 of the AA, in that, it could be relied upon in any proceedings in any court. If there is nothing in the award to enforce, the award could not be registered. The award may be relevant and even necessary for any subsequent or follow-up claim by the appellants against the respondent either independently or consequent upon the award. The JC had no jurisdiction and misdirected herself in finding the ground of confidentiality to be a compelling argument against registration. The JC was therefore plainly wrong in refusing to register the award on this ground. The ground of confidentiality also could not be sustained to oppose registration as it was within the contemplation of the parties that the findings of the arbitration would be disclosed for use at the trial of the civil suit. (paras 25-27 & 30)

(3) The purpose of the registration of an award is to enable the award to be enforced or challenged. If only the dispositive part is registered, the court tasked with enforcement would be deprived of the advantage of understanding the arbitrator or tribunal's reasoning. The bifurcation of the award was not intended by Parliament, as, by virtue of s. 36 of the AA, the award may be relied upon by any party in any proceeding in any court. If it was the intention for only the dispositive part of the award to be registered, the statute would have provided so in clear terms. However, there was nothing in s. 38 of the AA or anywhere else in the Act which allowed for only part of the award to be registered, except for s. 38(3) which allows for part of the award to be recognised and enforced where a decision is made on matters not submitted to arbitration. This applies where the decision is separable. (paras 36-38)

(4) The JC, by way of analogical comparison, relied on the procedures that are applicable with the Reciprocal Enforcement of Judgments Act 1958 ('REJA'). However, in light of the definition of 'judgment' in s. 2 of the REJA, REJA does not deal with arbitration awards. It applies to awards which have become enforceable in a foreign country as a judgment of the court usually after registration in accordance with the laws of the foreign country. Further, in the English authorities relied on by the respondents, there was no such proposition that only the material part of the award is to be registered. Unlike the AA, there is no statutory definition in English arbitration law and therefore, there is no guidance provided by the English cases. In the circumstances, the decision of the High Court was plainly wrong, warranting appellate intervention. (paras 39, 40 & 42-45)

Bahasa Malaysia *Headnotes*

Menurut satu perjanjian penyelesaian, perayu-perayu dan responden bersetuju untuk menyelesaikan secara persahabatan prosiding undang-undang tertentu dan membenarkan penyelesaian penuh dan muktamad kesemua perkara yang menjadi pertikaian antara mereka. Apa-apa pertikaian berkaitan yang sama akan dikemukakan untuk penyelesaian melalui timbang tara. Pada sekitar 2009, perayu-perayu memulakan tindakan terhadap responden dan lima yang lain ('Guaman 2009'). Dalam guaman itu, perayu-perayu menuntut bahawa perjanjian penyelesaian dimeterai melalui salah nyataan fraud oleh responden dan/atau wakil-wakilnya. Sebelum guaman tersebut boleh diteruskan, responden memperoleh perintah mahkamah ini untuk penangguhan prosiding dalam Guaman 2009 berpihak pada timbang tara, berdasarkan perjanjian timbang tara. Kemudian, responden memulakan prosiding timbang tara terhadap perayu-perayu di Singapura berdasarkan klausa perjanjian timbang tara. Perayu-perayu memfailkan tuntutan balas untuk ganti rugi untuk fraud terhadap responden dalam prosiding timbang tara tersebut. Walau bagaimanapun, Tribunal Timbang Tara membuat dapatan bahawa tuntutan balas ditarik balik atas alasan kegagalan perayu-perayu mengemukakan pendahuluan atas kos. Perayu-perayu kemudian

memohon untuk kos ditaksir dan Pendaftar Singapore International Arbitration Centre mengemukakan sijil pentaksiran. Responden, sebaliknya, memohon pada Mahkamah Tinggi Singapura agar mengetepikan award terakhir. Walau bagaimanapun, permohonan itu ditolak oleh Mahkamah Tinggi Singapura. Perayu-perayu memfailkan saman pemula ('SP') ini bawah s. 38 Akta Timbang Tara 2005 ('Akta') dan A. 69 k. 8 Kaedah-kaedah Mahkamah 2012 untuk mendaftarkan award terakhir berdasarkan dapatan Tribunal Timbang Tara. Responden mencabar SP atas alasan bahawa hanya bahagian dispositif award tersebut boleh didaftarkan sebagai penghakiman Mahkamah Tinggi Malaya. Pesuruhjaya Kehakiman ('PK') dalam membenarkan permohonan tersebut, memutuskan bahawa hanya bahagian dispositif award boleh diiktiraf sebagai mengikat dan boleh dikuat kuasa sebagai penghakiman Mahkamah Tinggi. Pesuruhjaya Kehakiman mentafsir terma 'award' dalam s. 2 Akta sebagai merujuk hanya pada 'bahagian dispositif' award dan bukan keseluruhan award. Oleh itu, rayuan ini.

Diputuskan (membenarkan rayuan; mengetepikan perintah Mahkamah Tinggi)

Oleh Harmindar Singh Dhaliwal HMR menyampaikan penghakiman mahkamah:

(1) Berdasarkan s. 38 Akta, keperluan untuk pendaftaran hanya untuk pemohon mengemukakan award yang disahkan asal atau salinan yang disahkan benar serta perjanjian timbang tara asal atau salinan yang disahkan benar, dengan terjemahan jika ini lain daripada bahasa kebangsaan atau bahasa Inggeris. Tidak dipertikaikan bahawa perayu telah mematuhi kesemua keperluan formal yang ditetapkan dalam s. 38. Selanjutnya, senarai panjang alasan bawah s. 39 Akta, untuk menafikan permohonan pendaftaran dalam s. 38, bermaksud bahawa alasan-alasan tersebut diniatkan sebagai lengkap, iaitu, penafian pengiktirafan atau pelaksanaan award timbang tara hanya boleh dibenarkan atas alasan-alasan yang dinyatakan dalam s. 39. Dalam rayuan ini, tiada satu pun alasan-alasan dalam s. 39 Akta, sama ada secara keseluruhan atau sebahagian, dibangkitkan oleh responden di Mahkamah Tinggi. Berikutan itu, PK tidak boleh menafikan pendaftaran award sebagai penghakiman mahkamah.

(2) Seksyen 36(1) Akta memperuntukkan asas yang luas untuk menggunakan award yang didaftarkan bawah s. 38 Akta, iaitu, ini boleh disandarkan dalam apa-apa prosiding di mana-mana mahkamah. Jika tiada apa-apa dalam award untuk dilaksanakan, award tersebut tidak boleh didaftar. Award tersebut mungkin relevan dan malahan perlu untuk apa-apa tuntutan terkemudian atau tuntutan susulan oleh perayu-perayu terhadap responden sama ada secara berasingan atau berikutan award tersebut. Pesuruhjaya Kehakiman tiada bidang kuasa dan tersalah arah diri dalam mendapati alasan kerahsiaan sebagai hujahan yang meyakinkan menentang pendaftaran. Oleh itu, PK jelas terkhilaf apabila menolak untuk mendaftar award atas alasan ini. Alasan kerahsiaan juga

A tidak boleh dikekalkan untuk menentang pendaftaran kerana pihak-pihak menyedari bahawa dapatan-dapatan timbang tara akan didedahkan untuk kegunaan dalam perbicaraan guaman sivil.

(3) Tujuan pendaftaran award adalah untuk membolehkan award dikuatkuasakan atau dicabar. Jika hanya bahagian dispositif didaftarkan, B mahkamah yang dipertanggungjawabkan dengan penguatkuasaan akan dinafikan faedah memahami alasan penimbang tara atau tribunal. Pencabangan award tidak diniatkan oleh Parlimen, kerana, melalui s. 36 Akta, award boleh disandarkan atas mana-mana pihak dalam apa-apa prosiding di mana-mana mahkamah. Jika niatnya hanya untuk bahagian C dispositif award didaftarkan, statut akan memperuntukkan sedemikian dengan jelas. Walau bagaimanapun, tiada apa-apa dalam s. 38 Akta atau di mana-mana dalam Akta yang membenarkan hanya sebahagian award didaftarkan, kecuali s. 38(3) yang membenarkan sebahagian award diiktiraf dan dikuatkuasakan apabila keputusan dibuat atas perkara-D perkara yang tidak dikemukakan pada timbang tara. Ini diguna pakai apabila keputusan itu boleh dibahagikan.

(4) Pesuruhjaya Kehakiman, melalui perbandingan analogi, bersandar atas prosedur yang diguna pakai untuk Akta Penguatkuasaan Penghakiman Bersalingan 1958 ('APPB'). Walau bagaimanapun, berdasarkan definisi E 'penghakiman' dalam s. 2 APPB, APPB tiada kena-mengena dengan award timbang tara. Ini hanya diguna pakai untuk award-award yang menjadi berkuat kuasa di negara asing sebagai penghakiman mahkamah, biasanya selepas pendaftaran menurut undang-undang negara asing tersebut. Selanjutnya, dalam autoriti Inggeris yang disandarkan oleh F responden-responden, tiada proposisi bahawa hanya bahagian penting award boleh didaftarkan. Tidak seperti Akta, tiada definisi statutori dalam undang-undang timbang tara Inggeris dan oleh itu, tiada panduan dalam kes-kes Inggeris. Dalam hal keadaan tersebut, keputusan Mahkamah Tinggi jelas khilaf, mewajarkan campur tangan rayuan.

G **Case(s) referred to:**

Ali Shipping Corporation v. Shipyard Trogir [1999] 1 WLR 314 ***(refd)***

Brake v. Patley Wood Farm LLP [2014] EWHC 4192 ***(refd)***

China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 FC ***(refd)***

Christopher Martin Boyd v. Deb Brata Das Gupta [2014] 9 CLJ 887 FC ***(refd)***

H *Dr Dieter Gobbers v. Jacob and Toralf Consulting Sdn Bhd & Ors And Other Appeals [2014] 1 LNS 1175 CA* ***(refd)***

Enterprise Insurance Company Plc v. U-Drive Solutions (Gibraltar) Ltd And Another [2016] EWHC 1301 ***(refd)***

Eu Boon Yeap & Ors v. Ewe Kean Hoe [2007] 6 CLJ 791 CA ***(refd)***

I *Konkola Copper Mines v. U&M Mining Zambia Ltd [2014] EWHC 2374* ***(refd)***

Ngo Chew Hong Oils & Fats (M) Sdn Bhd v. Karya Rumpun Sdn Bhd [2009] 1 LNS 1321 HC ***(refd)***

Open Type Joint Stock Company Efirnoye ("EFKO") v. Alfa Trading Ltd [2012] 1 CLJ 323 HC ***(refd)***

Legislation referred to:
Arbitration Act 2005, ss. 2, 33(3), 36(1), 38(1), (2), (3), 39(1), (3)
Reciprocal Enforcement of Judgments Act 1958, ss. 2, 3, 4
Rules of Court 2012, O. 69 r. 8

Other source(s) referred to:
Peter Ashford, *Handbook on International Commercial Arbitration*, 1st edn, 2009, p 262
Russel on Arbitration, 23rd edn, pp 6-028

For the appellants - Gopal Sri Ram, Stanley Isaacs, C Sivasankar, Shara Isaacs & David Yii; M/s Isaacs & Tan
For the respondent - Mohd Arief Emran Arifin & Nimisha Jaya Gobi; M/s Wong & Partners
For the intervener - GK Ganesan & Shalini Ragunath, Goh An Nee & CC Lam; M/s GK Ganesan

[Editor's note: For the High Court judgment, please see Jacob And Toralf Consulting Sdn Bhd & Ors v. Siemens Industry Software GmbH & Co KG (Germany) [2018] 1 LNS 460 (overruled).]

Reported by S Barathi

JUDGMENT

Harmindar Singh Dhaliwal JCA:

[1] This is an appeal from the order of the High Court at Kuala Lumpur dated 26 May 2017. The High Court had made an order on the appellants' motion pursuant to s. 38 of the Arbitration Act 2005 ("AA 2005") and O. 69 Rules of Court 2012 ("ROC 2012") to register only the dispositive portion of the arbitration award dated 8 May 2015 ("the award") and declined to register the award as a whole.

[2] Aggrieved with the decision not to register the award as a whole, the appellants filed this appeal. The appeal was heard on 8 March 2018. After hearing the parties and taking into consideration the written submissions, we allowed the appeal and set aside the order of the High Court. Our reasons for doing so now follow.

The Background

[3] The background facts are well set out in the judgment of the learned Judicial Commissioner ("JC") and in the submissions of the parties. The first and fourth appellants are companies incorporated in Malaysia. The second and third appellants are Malaysian citizens and directors of the first and the fourth appellants. The respondent is a company incorporated under the laws of Germany with a last known business address in Germany. It does not have any business presence in Malaysia.

[4] Pursuant to a settlement agreement dated 31 July 2008 ("the settlement agreement"), the appellants and the respondent agreed to amicably resolve certain legal proceedings and to allow for a full and final settlement of all matters in issue between them. Any disputes in relation to the same were to be submitted for resolution through arbitration. The following arbitration clause was found in the settlement agreement:

> This Agreement shall be governed by and construed in accordance with Malaysia law. All disputes at all material time arising out of or in connection with the present Agreement shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce (ICC) by three arbitrators appointed in accordance with the said Rules. Language of the proceedings shall be English. The seat of the arbitration shall be Singapore.

[5] Sometime in 2009, the appellants commenced an action against the respondent and five others *via* Suit No. S-22-129-2009 in the High Court of Kuala Lumpur ("suit 2009"). In the said suit, the appellants claimed that the settlement agreement was entered into by reason of fraudulent misrepresentation by the respondent and/or its representatives.

[6] Before the suit could be proceeded with, the respondent obtained an order from this court on 26 April 2011 to stay the proceedings in suit 2009 in favour of arbitration on account of the arbitration agreement. The appellants' motion for leave to appeal against the decision of this court was dismissed by the Federal Court.

[7] Thereafter, the respondent initiated arbitration proceedings against the appellants in Singapore pursuant to the arbitration agreement clause where it sought for the following reliefs:

(a) Declaration as to the validity and finality of the settlement agreement entered into between the respondent and the appellants, and in the event of an opposite finding, the return to the respondent of the sum of EUR 3 million plus interest calculated from 8 August 2008;

(b) Declaration that the present tribunal has sole jurisdiction to adjudicate on all disputes arising out of or in connection with the settlement agreement, and grant any reliefs, including reliefs sought by the appellants in suit 2009;

(c) Declaration as to the final and conclusive nature of the waiver of any claims of the respondent under the settlement agreement, and their inability to assert any future claims including the ones asserted under suit 2009;

(d) Determination as to the absence of valid cause available to the appellants in initiating proceedings under suit 2009, and a further declaration seeking the appellants to withdraw suit 2009;

(e) Declaration to the effect that the appellants jointly and severally bear the costs and expenses of (i) this arbitration, and (ii) the suit 2009, and respective appeals of the respondent plus interest.

(f) Dismissal of the appellants' counterclaim.

[8] The appellants had filed a counterclaim for damages in fraud against the respondent in the arbitration proceedings. However, the tribunal made a finding that the said counterclaim was withdrawn due to the appellants' failure to provide the required advances on costs.

[9] The arbitration was conducted before the arbitration tribunal from 24 May 2014 to 30 May 2014 in Singapore. The panel of arbitration consisted of Mr Philip Jeyaratnam SC, the Hon Mr Chan Sek Keong, former Chief Justice of Singapore and Mr Alan J Thambiayah. On 8 May 2015, the arbitration tribunal delivered its final award. In the final award, the arbitration tribunal concluded that it has jurisdiction to hear and determine the respondents' claims and made the following findings:

> N. Summary of findings
>
> 185. Summing up, the Tribunal concludes that it has jurisdiction to hear and determine the Claimant's claims, and that:
>
> a. The Settlement Agreement was procured by fraudulent misrepresentation;
>
> b. The Respondents did not affirm the Settlement Agreement;
>
> c. The Respondents, in instituting the 2009 Malaysian Suit, breached the arbitration agreement, but the matter has already been dealt with by the Malaysian Courts and so there is no arbitrable issue for this Tribunal.
>
> 186. Accordingly, the Claimant [Respondent] is not entitled to any of the declarations or relief sought by it.

[10] At paras. 189 to 192 of the final award, the tribunal made the following disposition:

> P. Disposition
>
> 189. In the premises, the Tribunal concludes and holds that the Claimant's [Respondent] claim be dismissed in its entirety.
>
> 190. The Tribunal awards to the Majority Respondents [Appellants] and to the 3rd Respondent their costs of this arbitration, to be taxed pursuant to section 21 of the International Arbitration Act, if not agreed.
>
> 191. The Tribunal also orders that the fees and expenses of the ICC and the Arbitral Tribunal be borne by the Claimant [Respondent]
>
> 192. All other claims and relief sought are hereby rejected.

[11] The appellants then applied to have their costs taxed and on 15 April 2016, the Registrar of the Singapore International Arbitration Centre (SIAC) issued the taxation certificate. The respondent in turn applied to the High Court of Singapore to set aside the final award. On 4 July 2016, the High Court of Singapore dismissed the respondent's application with costs. There was no appeal filed by the respondent.

Proceedings In The High Court

[12] On December 2016, the appellants filed the instant originating summons to register the final award based on the findings made by the arbitration tribunal. The application was made under s. 38 of AA 2005 and O. 69 r. 8 of ROC 2012 seeking the following orders:

(i) The final award dated 8 May 2015 from the ICC International Court of Arbitration by the arbitrators Mr Phillip Jeyaretnam SC, Mr Chan Sek Keong and Mr Alan J Thambiayah in the matter of ICC Arbitration 17795/CYK under the rules of ICC between Siemen Industry Software GmbH & Co KG (formerly known as Innotec GmbH) ("the claimant") and Jacob and Toralf Consulting Sdn Bhd (formerly known as Innotec Asia Pacific Sdn Bhd) ALCIM Holding Sdn Bhd (formerly known as Alcim Technology Sdn Bhd), Toralf Mueller, Jacob s/o George, Thomas George and PEC Konsult Sdn Bhd ("the respondents") be recognised as binding and be enforced by entry of judgment against the respondent herein;

(ii) Cost of this application;

(iii) Such further and/or other reliefs as deemed fit and proper by this Honourable Court.

[13] By this application, the appellants sought to register the entire award (together with the findings made by the arbitral tribunal). The respondent challenged this originating summons on the basis that only the dispositive portion of the award was capable of being registered as a judgment of the High Court of Malaya. The reason for doing so is not difficult to discern. The award contained damning findings of the tribunal. One such finding, as was alluded to earlier, was that the settlement agreement, upon which the arbitration was founded, was procured by fraudulent misrepresentation by the respondent.

[14] The respondent, however, asserted that the application to register appeared to be an attempt to utilise the findings of the said arbitration award for some other ulterior or collateral purpose and not for the purpose of enforcing the said award. It was also argued that there was nothing to enforce in view of the fact that the declarations sought by the respondent in the arbitration proceedings were dismissed.

[15] The learned JC, in granting the application, agreed with the respondent in that only the dispositive portion of the award was capable of being recognised as binding and enforceable as a judgment of the High Court. The learned JC construed the term "award" in s. 2 of AA 2005 by finding that it only refers to the "dispositive part" of an award and not the whole award. Her findings in this context appear at paras. [80] and [82] of the grounds of judgment:

> [80] In this respect I am in agreement with the Respondent's argument that if the intention to register the findings as part of the decision of an arbitrator/arbitration tribunal, the definition of award in s. 2 of the AA ought to be "a decision of the arbitral tribunal and the substance of the dispute ..." rather than the present definition "a decision of the arbitral tribunal on the substance of the dispute ...
>
> [82] Under the circumstances there is no justification to construe the term "award" as including the Final Award as to do so would go against the very intention of ss. 38 and 39 of the AA, namely to provide recognition and enforcement to the Disposition of the Final Award.

[16] In support of her decision, the learned JC relied on the Reciprocal Enforcement of Judgments Act 1958 (Act 99)("REJA") in the following fashion:

> [103] Thus Act 99 is concerned with the registration of the operative part of the judgment which refers to the decision of the relevant court for the payment of a certain sum of money, for the purpose of enforcement. The Act is not concerned with the finding or reasoning made by the superior court in arriving at such decision ... .

[17] The learned JC also refused to allow the registration of the award on the ground of confidentiality in arbitration. As the learned JC put it:

> [99] ... the duty of parties to an arbitration proceedings to maintain the confidentiality of the arbitration proceedings, in particular the arbitration award and the reasons thereto is indeed a compelling ground for this court to decide against the Applicants' OS.

The Instant Appeal

[18] Essentially, the same arguments were canvassed before us. This time, however, the intervener had come on board and raised arguments in support the position of the appellants and against the decision of the High Court. The issue raised in this appeal was fairly straightforward. It concerned the law relating to the registration of arbitration awards. In particular, the issue concerned the meaning of "award" in AA 2005. Does "award" mean any part of an award as ascertained by the court, or must it mean the entire award? So, in other words, can the court in registering an award under ss. 38 and 39 of AA 2005 select one part of the award, be it the dispositive part, and ignore the other parts of the award.

[19] The starting point in trying to resolve the issues as raised above must be a consideration of ss. 38 and 39 of AA 2005. Section 38(1) and (2) read:

> 38 (1) On an application in writing to the High Court, an award made in respect of an arbitration where the seat of arbitration is in Malaysia or an award from a foreign State shall, subject to this section and section 39 be recognised as binding and be enforced by entry as a judgment in terms of the award or by action.
>
> (2) In an application under subsection (1) the applicant shall produce:
>
> (a) the duly authenticated original award or a duly certified copy of the award; and
>
> (b) the original arbitration agreement or a duly certified copy of the agreement.

[20] It would appear from a plain reading of s. 38 that the only requirement for registration was for an applicant to produce a duly authenticated original award or duly certified copy as well as the original arbitration agreement or a duly certified copy, with a translation where it is otherwise than in the national language or the English language (s. 38(3) AA 2005). It was not disputed that the appellant here had complied with the formal requirements set out in s. 38.

[21] Having complied with the formal requirements in s. 38, we agree that the registration of an international arbitration award is granted as of right to an applicant unless the respondent can show any reason under s. 38 of AA 2005, or under any of the specified grounds provided in s. 39 of the same Act, to refuse registration and enforcement.

[22] Coming now as we must to s. 39 of AA 2005, this is a specific provision dealing with the grounds for refusal of a registration application in s. 38. Section 39(1) reads:

> 39 (1) Recognition or enforcement of an award, irrespective of the State in which it was made, may be refused only at the request of the party against whom it is involved:
>
> (a) where that party provides to the High Court proof that:
>
> (i) a party to the arbitration agreement was under any incapacity;
>
> (ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of the State where the award was made;
>
> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;
>
> (iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration;

(vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

(vii) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the High Court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

(ii) the award is in conflict with the public policy of Malaysia

[23] The extensive nature of the list of grounds must mean that it was intended to be exhaustive in that refusal of recognition or enforcement of an arbitral award can only be allowed on the grounds stated in s. 39 AA 2005. It is also plain given the express words in s. 39 of the Act that the onus of showing why any such arbitral award ought not to be recognised or enforced shifts to the party opposing such registration or enforcement (see also *Ngo Chew Hong Oils & Fats (M) Sdn Bhd v. Karya Rumpun Sdn Bhd* [2009] 1 LNS 1321; *Open Type Joint Stock Company Efirnoye ("EFKO") v. Alfa Trading Ltd* [2012] 1 CLJ 323; [2012] 1 MLJ 685).

[24] In the instant appeal, it would appear that none of the grounds in s. 39 AA 2005 to refuse registration of the award, whether as a whole or in part, was raised by the respondent at the High Court. It must follow, as a consequence, that the learned JC could not refuse to register the award as a judgment of the court. As alluded to earlier, the respondent's sole argument to refuse registration of the award was that the registration was an attempt to utilise the findings of the said arbitration award for some ulterior or collateral purpose and not for the purpose of enforcing the award. This argument is clearly not recognised as a ground for challenge under s. 39 AA 2005.

[25] This argument of an ulterior motive, in our view, also overlooks the other purposes of the award as set out in s. 36(1) AA 2005. Section 36(1) AA 2005 provides a broad basis to use an award that is registered under s. 38 AA in that it can be relied upon in any proceedings in any court. The section reads:

36(1) An award made by an arbitral tribunal pursuant to an arbitration agreement shall be final and binding on the parties and may be relied upon by any party by way of defence, set off or otherwise in any proceedings in any court.

[26] This provision also puts paid to the proposition that if there is nothing in the award to enforce, the award cannot be registered. Considering the purpose for which the award can be used, this proposition, with respect, is misconceived in law. We take the view that the award may be relevant and even necessary for any subsequent or follow up claim by the appellants here against the respondent either independently or consequent upon the award. The words "or otherwise in any proceedings in any court" is couched in such wide terms that it would include the kind of matters we have just alluded to.

[27] We would also add that the same reasons would also apply for the refusal to register the award on the ground of confidentiality. At the risk of repetition, this is not a ground for refusal provided in s. 39 AA. It is unfortunate that the learned JC found the ground of confidentiality to be a compelling argument against registration. With respect, the learned JC had no jurisdiction to declare so and had therefore misdirected herself in law. In our view, and with respect, the learned JC was plainly wrong in refusing to register the award on this ground.

[28] In any event, we found it rather curious that the respondent would rely on the ground of confidentiality to deny registration. It was no secret that the appellants and the intervener intended to rely on the arbitration award in the suit 2009. An application for stay of proceedings was sought in that suit on the basis that the issues, nature and characteristics of the claim in the arbitration proceedings and the court proceedings in the said civil suit were similar and overlap. As such, the findings of fact made by the arbitral tribunal would be relevant to the said civil suit.

[29] Although it is trite law that a term imposing an obligation of confidentiality was to be implied into arbitration agreements as a matter of law, there were exceptions permitting disclosure, for example, where there was consent by the parties or where disclosure was reasonably necessary for the protection of the legitimate interests of an arbitrating party or in the interests of justice (*Ali Shipping Corporation v. Shipyard Trogir* [1999] 1 WLR 314).

[30] In the dispute between them, both parties had seemingly taken the position in the said civil suit that it would be desirable to stay the court proceedings although in the end, for reasons which appear in the reported judgment, this court was compelled to make such an order (see *Dr Dieter Gobbers v. Jacob and Toralf Consulting Sdn Bhd & Ors And Other Appeals* [2014] 1 LNS 1175; [2015] 1 MLJ 507). It was therefore within the contemplation of the parties that the findings of the arbitration would be disclosed for use at the trial of the said civil suit. For these reasons as well, the ground of confidentiality to oppose registration cannot be sustained.

[31] Even with that being the case, we are constrained to observe that in the High Court, learned counsel for the respondent indicated to the court that the respondent had no objection to the registration of the award provided that only the dispositive part of the award was registered. The appellants, of course, objected claiming that the concession would be wholly outside the ambit and purview of s. 38 read with s. 39 of the AA.

[32] This brings us then to what we consider to be the crux of this whole appeal which is whether the entire award is capable of being registered to be recognised and enforced or whether it ought to be only the dispositive portions of the same. To recall, s. 38(1) of AA 2005, as set out earlier, states that an award shall be recognised as binding and be enforced by entry as a judgment in terms of the award or by action. Under s. 2 of AA 2005, "award" is defined as:

> a decision of the arbitral tribunal on the substance of the dispute and includes any final, interim or partial award and any award on costs or interest but does not include interlocutory orders.

[33] The appellants contended that a decision on the substance of the dispute includes the findings on the same and would therefore be a necessary portion of the award to be registered. In other words, the award must disclose the substance of the dispute. The respondent submitted, and which submission found favour with the learned JC, that a decision on the substance of the dispute must mean the final dispositive portion only.

[34] In this context, it is pertinent to observe that art. 25(2) of the ICC International Court of Arbitration Rules 1998, on which this arbitration was bound by, provides: "The Award shall state the reasons upon which it is based". This requirement is also found in our s. 33(3) AA 2005. Our attention was also drawn to *Russel on Arbitration*, (23rd edn) at pp. 6-028 where it is stated: "A reasoned award is one in which the tribunal sets out the reasons for its decision and these reasons form part of the award itself".

[35] The importance of making a reasoned award available to all parties is also explained in the *Handbook on International Commercial Arbitration* (1st edn, 2009) by Peter Ashford at p. 262:

> As ever, it must be borne in mind that the Award has three main purposes. First, to tell the parties what they must do. Second, to explain why the decision has been made, and third, that of consideration by an enforcing body or a Court of Appeal, this demands, not formality, but sufficient information to enable the award to stand on its own.

[36] In *Christopher Martin Boyd v. Deb Brata Das Gupta* [2014] 9 CLJ 887, the Federal Court observed (at p. 897) that the enforcement of arbitration awards must be viewed in two parts. First is the registration of the arbitration award itself as a judgment of the court and secondly the enforcement or execution of such a judgment. Reverting to the instant appeal, it is therefore a fair argument that the purpose of the registration of an award is to enable

A the award to be enforced or challenged. We find merit in the argument that if only the dispositive part of the award is registered, the court tasked with enforcement will be deprived of the advantage of understanding the arbitrator or tribunal's reasoning.

B **[37]** We are also persuaded that the bifurcation of the award, as suggested by the respondent, was not intended by Parliament as by virtue of s. 36 of AA 2005, the award may be relied upon by any party in any proceeding in any court. If it was the intention for only the dispositive part of the award to be registered, the statute would have provided so in clear terms.

C **[38]** In our view, there is nothing in s. 38 of the AA 2005 or anywhere else in the same Act which allows for only part of the award to be registered except for s. 39(3) which allows for part of the award to be recognised and enforced where a decision is made on matters not submitted to arbitration. This applies where the decision is separable. This lends support to the proposition that if indeed it was the intention of the Legislature to allow for D registration of only the dispositive part, it would have been clearly stated in terms similar to how it was provided in s. 39(3) for separable decisions.

[39] Now, the learned JC in arriving at her decision, by way of an analogical comparison, relied on the procedures that are applicable with the E Reciprocal Enforcement of Judgments Act 1958 ("REJA"). We were also invited by learned counsel for the respondent in this appeal to consider drawing an analogy with s. 4 of REJA which has the effect of registering foreign judgments as a judgment of the High Court of Malaya for the purpose of enforcement of the same. It was submitted that under s. 2 of REJA, the definition of "judgment" includes a foreign arbitration award.

F **[40]** After a careful perusal of the provisions of REJA, we were of the view that REJA only applies to foreign judgments and not arbitration awards. We note that the definition of "judgment" in s. 2 of REJA includes "an award in proceedings in an arbitration if the award has, pursuant to the law in force in the place where it was made, become enforceable in the same manner as G a judgment given by a court in that place". It is our impression, therefore, that REJA does not deal with arbitration awards as submitted. It applies to awards which have become enforceable in a foreign country as a judgment of the court, usually after registration in accordance with the laws of that foreign country.

H **[41]** We also do not think that ss. 3 and 4 of REJA, upon which much reliance was placed by the learned JC, provide any assistance as those provisions apply only to judgments given in the superior courts of reciprocating countries. It would have been more appropriate to rely on the provisions of AA 2005 which is not only recent legislation but specifically I created to govern all matters relating to arbitration in Malaysia.

[42] Much reliance was also placed on English authorities to advance the proposition that only the material part of the award is to be registered. The cases cited in support were *Enterprise Insurance Company Plc v. U-Drive Solutions (Gibraltar) Ltd And Another* [2016] EWHC 1301 ("*Enterprise Insurance*"); *Brake v. Patley Wood Farm LLP* [2014] EWHC 4192 and *Konkola Copper Mines v. U&M Mining Zambia Ltd* [2014] EWHC 2374. However, our assessment of these cases shows no such proposition. Instead, the courts there were concerned with the issue of whether there was a final award, so as to provide the court with jurisdiction, as opposed to an interim or partial award or a procedural order. The courts there were also interpreting various provisions of the UK Arbitration Act 1996 and we were not advised as to whether our own AA 2005 had the same or similar provisions.

[43] What is pertinent though is that unlike our AA 2005, there is no statutory definition of an award in English arbitration law as was noted in the English cases cited earlier. In the English cases, reference is invariably made to Russel on Arbitration where, for example, in the case of *Enterprise Insurance*, *supra*, the following passage was cited with approval (at para. 36):

> In principle an award is the final determination of a particular issue or claim in the arbitration. It may be contrasted with orders and directions which address the procedural mechanisms to be adopted in the reference.

[44] So, whether an award is final or determinative of the claim or part of the claim and not an interim or partial word is not an issue in the instant appeal. Despite the forceful submissions of learned counsel for the respondent, we are not persuaded that the English cases provide the kind of guidance as submitted or, at least, not in the context of the issues confronting us.

Conclusion

[45] In the circumstances, and for the reasons we have given, we were of the view that the decision of the High Court was plainly wrong. As a result, appellate intervention was warranted (see *China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal* [1996] 3 CLJ 163; *Eu Boon Yeap & Ors v. Ewe Kean Hoe* [2007] 6 CLJ 791). Accordingly, we allowed the appeal and set aside the order of the High Court with costs of RM10,000 each to the appellants and the intervener subject to payment of allocator. As a necessary consequence of the appeal, we ordered that the award be registered as a judgment under s. 38 of AA 2005. Deposits were ordered to be refunded.